



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Captain Larry A. Fields, USAF (Retired)--Dual
Compensation Act--Employment with National Credit
Union Administration

File: B-226074

Date: June 3, 1988

DIGEST

A retired Air Force officer employed in a civilian position with the National Credit Union Administration is not exempt from the dual compensation restrictions of 5 U.S.C. §§ 5531, 5532, on the basis of the court's decision in Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986). There the court found that positions with the Federal Reserve Board are not covered by the dual compensation restrictions because the Federal Reserve Board is a "nonappropriated fund" instrumentality and the only such instrumentalities covered by the law are those of the Armed Forces. The National Credit Union Administration is an executive agency of the federal government which assesses member credit unions for funds which it uses to pay its expenses and its employees' salaries. Although these funds are collected as assessments from credit unions, they are required by law to be deposited in the Treasury and are spent by the Administration under statutory authority constituting a continuing appropriation; therefore, they are considered "appropriated funds," and the Administration is not a nonappropriated fund instrumentality for purposes of the dual compensation restrictions.

DECISION

The issue presented in this case is whether Captain Larry A. Fields, USAF (Retired), is subject to reduction in his

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military retired pay under the dual compensation restrictions prescribed by 5 U.S.C. § 5532 on account of his civilian employment with the National Credit Union Administration.^{1/} We find that his military retired pay is subject to those restrictions, applicable to military retirees who hold civilian "positions" as defined by 5 U.S.C. § 5531.

BACKGROUND

Captain Larry A. Fields was placed on the retired list as a Regular officer of the United States Air Force on July 1, 1984. In January of 1985, he began civilian employment as a GS-5 auditor for the National Credit Union Administration. On the basis of this civilian employment, the Air Force has reduced Captain Fields' military retired pay pursuant to the dual compensation restrictions imposed by 5 U.S.C. § 5532, which prescribes a formula for the reduction of military retired pay of retired Regular officers who are employed in civilian positions by the government.

Captain Fields wrote to the Air Force Accounting and Finance Center disagreeing with the reduction in his retired pay and asking that the matter be reconsidered. He contends that his retired pay should not have been subjected to reduction under the dual compensation provisions of 5 U.S.C. § 5532. He asserts that the Credit Union Administration uses no appropriated funds to pay his salary and, therefore, his position is not subject to the dual compensation restrictions. As support for his position he cites a 1986 federal Court of Appeals decision for the proposition that an organization's mere status as "an establishment of the federal government" is not a sufficient basis for application of section 5532, where that organization is a nonappropriated instrumentality not under the jurisdiction of the Armed Forces. Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986).

In requesting our decision in this matter, Air Force officials question whether the reduction in Captain Fields' retired pay is required under 5 U.S.C. § 5532, in light of the Denkler decision.

^{1/} The matter was presented to us by the Chief, Accounting and Finance Division, Directorate of Resource Management, Headquarters U.S. Air Force, Washington, D.C. It was assigned control number DO-AF-1470 by the Military Pay and Allowance Committee.

DUAL COMPENSATION RESTRICTIONS ON MILITARY RETIRED PAY

The current statutory dual compensation restrictions applicable to retired members of the uniformed services are codified in 5 U.S.C. §§ 5531 and 5532. Section 5532 places limits on the amount of retired pay a retired uniformed services member may receive if he becomes employed in a civilian "position" with the federal government. Section 5531 defines "position" for the purposes of section 5532 as a "civilian office or position . . . appointive or elective, in the legislative, executive or judicial branch of the government of the United States (including a government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces)"

NATIONAL CREDIT UNION ADMINISTRATION

The Credit Union Administration was established in 1970 pursuant to Public Law No. 91-206, 84 Stat. 49, Mar. 10, 1970, 12 U.S.C. § 1752a(a), as an independent agency within the executive branch of the government. The basic responsibility of the Administration is to administer the provisions of the Federal Credit Union Act. The responsibility and authority for managing the Administration is vested in a three-member board appointed by the President, by and with the advice and consent of the Senate. 12 U.S.C. § 1752a(b), (d). The board has the authority to appoint Administration employees and to "expend such funds" as it deems necessary or appropriate to carry out its functions. 12 U.S.C. § 1766(i). The operations of the Administration are funded by the collection of fees from credit unions which are required to be "deposited with the Treasurer of the United States for the account of the Administration and may be expended by the Board to defray the expenses incurred" in carrying out its functions. 12 U.S.C. § 1755(a), (d).

We have long held that the fees collected from federal credit unions for services rendered by the Bureau of Federal Credit Unions (now the National Credit Union Administration) and deposited in the Treasury represent appropriated funds. 35 Comp. Gen. 615 (1956). That is, the statutory provisions requiring that the fees from federal credit unions be deposited with the Treasurer of the United States in a special fund and making the fund available for expenditure in carrying out the Federal Credit Union Act constitute a continuing appropriation of such fees from the Treasury

without further action by Congress.^{2/} The funds were thus found to be subject to certain restrictions and limitations applicable to the use of appropriated monies. 35 Comp. Gen. supra, at 618. This position was reviewed and reaffirmed in a more recent decision, Edgar T. Callahan, 63 Comp. Gen. 31 (1983). Since Administration employees' salaries are paid from this central fund, they are paid from appropriated funds.

THE DENKLER DECISION

In Denkler v. U.S., 782 F.2d 1003 (Fed. Cir. 1986), the U.S. Court of Appeals determined that staff positions with the Board of Governors of the Federal Reserve System are not covered under the Dual Compensation Act, 5 U.S.C. §§ 5531, 5532.

The case involved four claimants, Regular officers of the Army and Navy, who had retired for length of service. Each had taken a staff position with the Board of Governors of the Federal Reserve System. The Federal Reserve Board is an instrumentality of the federal government designed to set policy and prescribe monetary measures for its member Federal Reserve banks. The Board is authorized to levy assessments on the Federal Reserve banks to pay its expenses and the salaries of its employees. 12 U.S.C. § 243. Concerning these matters, the law further provides that:

"The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and may leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this chapter and rules and regulations of the Board not inconsistent therewith; and funds derived from such assessments shall not be construed to be Government funds or appropriated moneys."
12 U.S.C. § 244. (Emphasis added.)

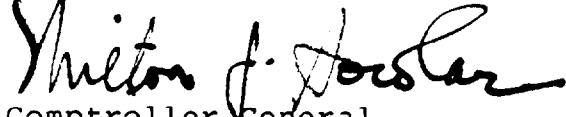
^{2/} It is fundamental that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law." U.S. Const. art. I, § 9, cl. 7.

Thus, the Board need not deposit these funds in the Treasury, and the funds are declared not to be appropriated funds.

In the Denkler case the Court of Appeals held that the Federal Reserve Board's "mere status" as a government instrumentality was not a sufficient basis, by itself, for application of section 5532 to the military retirees employed by such an organization. It found, in effect, that since the Board is a nonappropriated fund activity, employment with it is not covered by the definition in 5 U.S.C. § 5531, supra, since the only nonappropriated fund activities referred to there are those under the jurisdiction of the Armed Forces.

In another decision issued today, we stated that we will follow the court's judgment in the Denkler case. We also stated, however, that the court's opinion in Denkler cannot be applied to other federal agencies or organizations which are authorized to operate in any part with appropriated funds drawn from the Treasury. See Lieutenant Colonel Ralph E. Marker, Jr., USA (Retired), and Others, B-226546, B-226791.

It is our view, therefore, that the Court of Appeals' decision in Denkler does not provide a basis in the present case for finding that Captain Fields' employment with the National Credit Union Administration does not subject him to the dual compensation restrictions of 5 U.S.C. § 5532. Unlike the situation with the Federal Reserve Board, as discussed previously, the funds used by the Credit Union Administration are appropriated funds in that they are required to be deposited in the Treasury and are drawn therefrom by virtue of a continuing appropriation provided by law. 12 U.S.C. § 1755(a) and (d), supra. Also, consistent with this view, and contrary to the situation with the Federal Reserve Board's funds, is the fact that no statute directs that the Credit Union Administration's funds are not to be construed as appropriated funds. Therefore, the Denkler decision has no effect on this case since the Credit Union Administration is an appropriated fund agency. Accordingly, Captain Fields' employment with the National Credit Union Administration does subject him to the dual compensation provisions of 5 U.S.C. § 5532, and his claim for refund of amounts withheld from him on that basis is denied.



Acting Comptroller General
of the United States